Goodie Brand Packing Corp. *and* **Roberto Sanchez** *and* **Elva Rodriguez.** Cases 2-CA-18205, 2-CA-18299, 2-CA-18361, and 2-CA-18370

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 28 January 1983 Administrative Law Judge Arthur A. Herman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the judge's recommended Order as modified.

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by certain of its statements to and conduct regarding Union Steward Roberto Sanchez. However, we do not agree with his further findings that the Respondent violated Section 8(a)(3) of the Act by discharging Sanchez, that the strike in protest of Sanchez' discharge was a protected unfair labor practice strike, and that the strikers were discharged and refused reinstatement in violation of Section 8(a)(3).

The facts are fully set forth in the judge's decision. Briefly, the circumstances surrounding the discharge and strike are as follows. About 5:30 a.m., Friday, 25 September 1981, Sanchez left the wholesale market with which the Respondent does business in a company truck to return to the Respondent's premises. As he turned left onto a major highway, he unwittingly went south in a northbound lane. When he realized his error, he stopped the truck, put it in first gear, and proceeded to cross the concrete divider that separates the north and south lanes. The concrete divider is 12 inches wide and 5-1/2 inches high. Nat Solomon, one of four brothers who are the Respondent's principals, was proceeding south on his way back from the market at the same time and observed the entire incident.

When Sanchez returned to the Respondent's premises, he was told that he was indefinitely suspended. It was later determined that $2300 damage was done to the undercarriage of the truck. The Respondent at no time notified Sanchez as to when he should return to work or that it had agreed with Union Representative Mogulnicki that the suspension was to last 2 weeks. In these circumstances, we agree with the judge that Sanchez was discharged rather than suspended.

After the employees learned of steward Sanchez' discharge, they commenced a strike at the Respondent's premises. At various times thereafter, the Respondent reinstated some of the strikers and discharged others. The contract between the Respondent and the Union contained a no-strike clause. Since the judge found that Sanchez' discharge was a serious unfair labor practice within the meaning of *Arlan's Department Store*[2] he concluded that the strike was protected and that the Respondent further violated Section 8(a)(3) by discharging and refusing to reinstate the strikers.[3]

The Board held in *Wright Line* [4] that in cases alleging violations of Section 8(a)(3) which turn on employer motivation, the General Counsel must first make a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision. Then, once this is established, the employer has the opportunity to demonstrate that it would have reached the same decision even in the absence of the protected conduct.

In this case, the judge failed to apply the *Wright Line* test and analyze the evidence relied on by the Respondent in defense of its conduct. Rather, the judge merely concluded that the discharge of Sanchez was unlawful because it was the "direct result" of his union activities.

Applying *Wright Line* we find that the violations of Section 8(a)(1) committed by the Respondent clearly are sufficient to support a prima facie showing that union activity was a motivating factor in the Respondent's decision to discharge Sanchez. However, we also find that the Respondent has established that it would have discharged Sanchez even in the absence of his activity on behalf of the Union. In our opinion, the Respondent has shown that Sanchez' conduct in driving a company truck down the wrong side of a major highway for some distance, crossing the median, and damaging the truck is such gross negligence that it would have provoked discharge of any employee irrespective

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 133 NLRB 802 (1961).

[3] In view of our disposition of the case, we find it unnecessary to pass on the judge's application of *Arlan's*.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

of any animus the Respondent may have harbored against that employee. Not only was Sanchez' conduct responsible for doing $2300 in damages to the truck, it risked life-threatening consequences. There has been no showing that the Respondent excused such egregious misconduct on the part of other employees. Sanchez cannot, by being a union steward, insulate himself from justifiable discipline or use his union office as an excuse for not performing his job duties in a competent manner.[5] Accordingly, we shall dismiss the complaint insofar as it alleges that the Respondent discharged Sanchez in violation of Section 8(a)(3) of the Act.

As the discharge of Sanchez was lawful, we further find that in striking in protest the employees violated the no-strike clause in the collective-bargaining agreement and engaged in unprotected activity. Under these circumstances, it clear that "an employer is free to pick and choose whom he will fire and whom he will reinstate after the strike, so long as the basis for the selection is not discriminatory." *Chrysler Corp.*, 232 NLRB 466, 474 (1977). In this case, the judge made no such finding of discriminatory selection. Accordingly, we shall also dismiss the complaint insofar as it alleges that the Respondent violated Section 8(a)(3) in its treatment of the striking employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Goodie Brand Packing Corp., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said Order as modified.

1. Delete paragraphs 1(a) and (b) and reletter paragraphs 1(c) through (f) as paragraphs 1(a) through (d).

2. Delete paragraphs 2(a) through (c) and reletter paragraphs 2(d) and (e) as paragraphs 2(a) and (b).

3. Substitute the attached notice for that of the administrative law judge.

[5] *E. I. Dupont De Nemours*, 263 NLRB 159, 176 (1982); *East Texas Motor Freight*, 262 NLRB 868 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

Accordingly, we give you these assurances:

WE WILL NOT warn or threaten our employees with discharge for engaging in protected concerted activities.

WE WILL NOT coercively interrogate our employees concerning union sentiments and activities.

WE WILL NOT assign more onerous working conditions on our employees because they engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GOODIE BRAND PACKING CORP.

DECISON

STATEMENT OF THE CASE

ARTHUR A. HERMAN, Administrative Law Judge. The charge in Case 2-CA-18205 was filed on July 13, 1981,[1] by Roberto Sanchez, an individual. On August 21, a complaint issued thereon alleging that Goodie Brand Packing Corp. (Respondent or Company) violated Section 8(a)(1) of the National Labor Relations Act by threatening, warning, and interrogating employees, all because they engaged in union activities on behalf of Local 202, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or Local 202). On August 27, Sanchez filed a second charge in Case 2-CA-18299, on which a complaint issued on October 7, alleging the imposition of more onerous conditions of employment and further warnings to Sanchez, all because Sanchez was chosen shop steward and because he filed the previous charge,

[1] All dates herein are 1981 unless otherwise indicated.

all in violation of Section 8(a)(1), (3), and (4) of the Act. On September 30, Sanchez filed a third charge in Case 2-CA-18361, and on October 9, Elva Rodriguez, an individual, filed a charge in Case 2-CA-18370. On October 29, a consolidated complaint issued thereon, alleging further violations of Section 8(a)(1), (3), and (4) of the Act, including the discharge of Sanchez, Rodriguez, and several other employees. On October 30, an order consolidating cases and notice of hearing issued. Respondent duly filed answers to all complaints and denied the commission of the alleged unfair labor practices.

This case was tried before me on eight consecutive workdays from March 2 through 11, 1982, in New York, New York. The General Counsel's letter memorandum and Respondent's memorandum of law were timely filed, and have been duly considered.

Upon the entire record, including my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New York corporation engaged in the repacking and nonretail sale and distribution of tomatoes and other produce. Annually, Respondent purchases and receives at its Bronx, New York facility tomatoes and other produce valued in excess of $50,000 directly from points located outside the State of New York. The complaints allege, Respondent does not deny, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

I find that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a wholesale fruit and vegetable business at its premises on 153d Street in the Bronx, New York. It specializes in selling tomatoes to retail stores and restaurants. In addition to selling tomatoes, it also sells avocados, limes, mangoes, lettuce, and onions. Respondent purchases the produce in bulk from growers throughout the United States and Mexico, as well as from distributors located in the Hunts Point Market in the Bronx.[2] Upon arrival at Respondent's premises, the tomatoes are processed. They are sorted out according to size and color and repacked in different sized containers for shipment to various outlets.

The business is run by four Solomon brothers and several nephews.[3] Abe Solomon, Respondent's president, is the head buyer and in charge of labor relations. Respondent employs floorworkers, drivers, and porters.[4] The floorworkers operate (1) the stripping machines which sort the tomatoes by color, (2) the packing machines which package the tomatoes in assorted size consumer cartons, and (3) the Tropical packing machines, and they prepare tomatoes for bulk sale and repackaging. Drivers deliver Respondent's produce on its own fleet of trucks; no merchandise is picked up by Respondent's drivers except that merchandise which is purchased by Respondent at the Hunts Point Market.

The Union has had separate Associationwide contracts and renewals with Respondent covering the floorworkers and drivers going back several years. Both current collective-bargaining agreements contain valid union-security clauses and no-strike and no-lockout clauses, and both provide for the adjustment of grievances and arbitration. In addition, both agreements provide for recognition by Respondent of the Union's right to designate shop stewards. Felix Liciaga, a floorworker, testified that he was the shop steward for anywhere from 6 to 12 years up to sometime in 1978 or 1979. He stated that he quit being shop steward because he became aggravated when he could not settle the employees' grievances with management.

Approximately a year passed before Elva Rodriguez, a floorworker, became the next shop steward in February 1980.[5] Rodriguez stated that she represented both the floorworkers and drivers, and that about 2-3 months later, Raphael Larracuente, a floorworker, was appointed by the Union to be the assistant shop steward. Unlike her predecessor, Rodriguez made a determined effort to increase union membership among the employees by handing out membership cards to be filled out. For this she was rebuked by Leo Solomon while she was having lunch with two other employees on its premises, and told to conduct her union business outside the plant; this occurred about March 1980. In the beginning of April 1980, there was a transit strike in New York City and, according to Rodriguez who live in Yonkers, New York, she was unable to get to work, and, on April 14, 1980, she received a telegram from Respondent informing her that she was offered transportation.[6] With the telegram in hand, she reported to the plant for work and was told by Sol Solomon that there was no work for her. When the other employees heard about this and inquired of management, they were told that Rodriguez was an "S.O.B." With that, the employees left the premises and gathered outside. About an hour later, Teddy Mogilnicki, a union representative, appeared and, after listening to the employees, he went inside. Shortly thereafter he emerged to announce that everything was settled, and that Rodriguez, along with the other employees, should return to work. Rodriguez testified to further unjustified

[2] Respondent also grows produce on farms it owns in Florida, and ships it north for distribution.

[3] At the beginning of the hearing, Respondent stipulated that at all times material herein, all four brothers, Abe, Leo, Sol, and Nat, and David Solomon, a nephew, were supervisors within the meaning of Sec. 2(11) of the Act.

[4] Respondent employs two porters at its location at the Hunts Point Market but they are not involved in the instant proceeding.

[5] It is Rodriguez' uncontroverted testimony that only 11 employees out of a complement of about 60 were members of the Union at the time she was elected shop steward, and that the election took place in the Union's office. Rodriguez has been an employee of Respondent since October 1959, and joined the Union in 1961.

[6] Rodriguez denies receiving any offer of transportation.

harassment by Respondent during August and September 1980 in the form of letters by management to the Union complaining about Rodriguez' refusal to perform her role as shop steward and that she engaged in a deliberate slowdown in her work. When she confronted Mogilnicki with these letters, he told her to forget about them. About the same time, Rodriguez and her sister Santi were told that from now on they would be required to lift 32-pound boxes of tomatoes, which previously had been lifted for them by a man stationed near their work station.[7] When Rodriguez complained to Abe Solomon and stated that she had not been required to do that for the past 22 years, he told her that her alternative was to leave. When Rodriguez complained to Mogilnicki, he told her that he could not help her. And so, Rodriguez continued to work, lifting the boxes; at one point she brought a doctor's note to Abe Solomon because of the back pain she had developed, but to no avail.[8]

One further event occurred in 1980 and that was the filing of a decertification petition by Rodriguez on November 6, on behalf of Respondent's employees in Case 2-RD-1023. Inasmuch as the unit found appropriate was broader than that sought by the petitioner,[9] and the petitioner did not possess the requisite showing of interest in the broader unit, the petitioner chose to withdraw the petition, rather than have it dismissed by the Regional Director.

B. *Current Events*

Respondent hired Roberto Sanchez as a driver in 1975, and he became a Local 202 member in 1978.[10] In October 1980, Sanchez became a member of a dissident group within Local 202 known as Teamsters for a Democratic Union (TDU).[11] Rodriguez states that she decided to resign as shop steward in June 1981, because of all the problems she had with management as related supra, and she advised Mogilnicki of her decision. On July 1, 1981, Sanchez was elected shop steward by the employees and, like his predecessors, he represented both the drivers and the floorworkers. It is undisputed that Respondent refused and continued to refuse to recognize Sanchez as shop steward for the floorworkers, while it recognized him as shop steward for the drivers. It is Respondent's contention that as a driver Sanchez spent most of his working time on the road, and therefore could not adequately fulfill his duties as shop steward for the floorworkers.[12]

As soon as Sanchez was elected on July 1, 1981, he became a very active shop steward. It was his contention that Local 202 had not been policing Respondent's premises sufficiently, and was not enforcing the terms of the contracts as it should be. And so, during his short tenure, Sanchez filed 45 grievances with Local 202. Some of them dealt with backpay claims, some with floorworkers' problems on the premises, some with layoffs out of seniority, and some with disciplinary layoffs due to employees' refusals to work overtime.

Sanchez states that, shortly after he joined Local 202 in 1978, Leo Solomon inquired of him why he joined the Union and, when Sanchez responded that he needed the benefits for his family's protection, Leo Solomon told him that he should have talked it over with management instead of joining the Union. He stated also that in October 1980, when Local 5 of the Butchers Union became interested in representing Respondent's employees, and the latter had filed the decertification petition discussed supra, he, Sanchez, along with about 20 other employees of Respondent attended a union meeting and Sanchez acted as the translator; and that shortly thereafter he was questioned by several of the Solomon brothers who accused him of talking to other employees about union business while on working time, and that David Solomon told him to be careful because he was following him on his route. Thereafter, on October 10 and December 1, 1980 (see G.C. Exhs. 2 and 3), Sanchez was given copies of letters sent by Respondent to Local 202 complaining of Sanchez' lethargic performance on the job.[13]

And so, according to Sanchez, when he became such an active shop steward, Respondent reacted against him. On the day following Sanchez' election, July 2, 1981, after Sanchez had a conversation with Mogilnicki regarding the filing of grievances, Abe Solomon approached Sanchez and asked, "why are you organizing the workers here?" When Sanchez responded that this was a union shop, Solomon wanted to know what Sanchez was getting out of it and said, "from now on, you me [sic] going to have a fight every single day, and let's see how long you last in your job."

And, about a week after Sanchez was elected shop steward, an incident occurred involving three floorworkers whom Abe Solomon refused to allow to work because they had refused to work overtime the day before. The workers asked Sanchez to intercede on their behalf and, when he did, Abe Solomon told Sanchez that as far as he was concerned Sanchez was not the shop steward for the floorworkers, and he had better go back to work or else be fired. Sanchez states that he told Mogilnicki what had occurred and Mogilnicki told him that there was nothing he could do about it.[14]

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[7] Rodriguez' job was to take the tomatoes out of the 32-pound box and separate them into two different boxes.

[8] It is noted that all of the above is not alleged as violations in any of the complaints before me inasmuch as these events predate the 10(b) period. However, the General Counsel has offered it as background for the material allegations that follow, and it is for that reason that I relate the incidents herein.

[9] Respondent is and was a member of the New York-New Jersey Tomato Repackers' and Brokers' Association which negotiated contracts for its members.

[10] Sanchez states that he was never asked to join the Union but that he did it on his own volition.

[11] Respondent did not know this until a year later.

[12] On the same day Sanchez was elected, John Diaz, a floorworker, was designated to be an assistant shop steward and Sanchez instructed him to accept complaints from the employees and to pass them on to Sanchez for processing.

[13] The evidence is void of any prior written record of any difficulties encountered by Respondent re Sanchez' work performance since he began in 1975. In addition, Sanchez adequately explained what occurred on those two occasions, and his explanation went unrebutted.

[14] It is interesting to note that Sanchez' testimony, which was entirely unrebutted, also stated that other nonmember employees who also refused to work overtime the day before were permitted to work the next day.

Other instances of Respondent's opposition to Sanchez occurred in August and September 1981. In August, Abe Solomon told Sanchez from now on Sanchez would have to lay out his own money for tolls for which he would be reimbursed. Sanchez protested to Mogilnicki since this was a reversal of prior policy whereby if a driver asked for toll money before going on a trip he was never refused. Mogilnicki tried to get Solomon to agree, but Solomon was adamant and refused. In addition, he told Sanchez that he did not want to see Sanchez "Talking to anybody at all in the plant, because the only thing you've got in mind is union activities." And, again in September, Respondent accused Sanchez of conversing with other employees about union activities while they were on an authorized break in the men's room, and warned him about it.

At the time Sanchez was elected shop steward, he worked the day shift from 7 a.m. to 4 p.m., Monday to Friday, plus about 8-10 hours of overtime per week.[15] Toward the end of July, Respondent told Sanchez that because a night-shift driver was going on vacation, Sanchez would work the night shift for 2 weeks.[16] At the end of the 2 weeks, the employee who was on vacation was put on the day shift and Sanchez continued on the night shift. In addition, Sanchez was told that he would have to work Sunday also from 8 a.m. to whatever time he would finish and then report Sunday night at 12 midnight for the usual weekly night shift. Sanchez protested but to no avail, despite the fact that Sanchez enjoyed seniority over at least a half-dozen other drivers, all of whom had the requisite licenses to drive the same type of truck he did.

And, since Sanchez became shop steward, Respondent sent letters of complaint to Local 202 regarding his work performance on July 31, August 31, and September 10, 16, and 18. It is Respondent's contention, as testified to by Abe Solomon, that Sanchez' route was changed from time to time because he was not doing a good job, and that these changes took place before he became shop steward. In explaining why Sanchez was put on the Hunts Point night shift, Solomon gave several reasons: That the driver needed a class I license which Sanchez had; that the job required a driver with intelligence, which Solomon acknowledged that Sanchez had; and that since Nat Solomon was at the Hunts Point Market quite often, he could keep an eye on Sanchez.

C. *The September 25 Incident and Subsequent Events*

About 5:30 a.m., on Friday, September 25, Sanchez left the Hunts Point Market drivng a company truck back to Respondent's premises. As he turned left onto Bruckner Boulevard, he unwittingly went south in a north bound lane. When he realized his error, he stopped the truck, put it in first gear and proceeded to cross the concrete divider that separates the north and south lanes.[17] Nat Solomon had been proceeding south when this incident occurred and observed the whole thing. Sanchez then proceeded to Respondent's premises and helped unload the truck. According to Sanchez, Abe Solomon came up to him, and when he asked what happened, Sanchez related the incident, and Solomon merely walked away. According to Solomon, he told Sanchez "that at this particular time you're being suspended for a period of time, and—." Solomon went on to say that it was an indefinite suspension. Later that day Solomon addressed a letter to Local 202 confirming the fact that he had indefinitely suspended Sanchez because of the incident, and that the damage to the undercarriage of the truck was being evaluated.[18] About 15 minutes after Sanchez was told by Solomon that he was indefinitely suspended, Sanchez called Mogilnicki and told him. Mogilnicki responded that he already knew because Solomon had called him. According to Mogilnicki, Solomon told him that "he was going to fire Sanchez because of reckless driving"; Mogilnicki argued with Solomon and got Solomon to change his mind; Mogilnicki understood Solomon to say that he was suspending Sanchez for 1 week; however, according to Mogilnicki, he went to Respondent's premises later that day and Solomon told him that he was suspending Sanchez for 2 weeks. Solomon states that this conversation with Mogilnicki took place on October 2, not on September 25.[19] In any event, both Solomon and Mogilnicki admit that neither of them ever told Sanchez that the indefinite suspension had been converted to a 2-week suspension.[20] Sanchez states further that he received a call from Fox asking him to meet at Fox's office on September 30. Sanchez showed Fox Respondent's September 25 letter to Local 202, discussed supra, and asked its meaning; whereupon Fox said, "what the hell you think it is? You are fired."[21] Sanchez then proceeded to file his charge with the NLRB in Case 2-CA-18361, alleging the wrongful discharge.

As a result of what had transpired between September 25 and October 2, regarding Sanchez' status as an employee, and ignorant of any private arrangement reached between Solomon and Mogilnicki on October 2, about 25-30 of Respondent's employee met on October 3 at a community center near Respondent's premises to decide what action they should take to support Sanchez because they believed that he had been discharged. A decision was made to put a picket line in front of Respondent's premises on Monday, October 5, to protest Sanchez' dis-

[15] This had been Sanchez' shift for 2 years prior to July 1, 1981.

[16] Night shift hours were 12 midnight to 9 a.m.

[17] The divider is 12 inches wide and 5-1/2 inches high.

[18] Paid bills for the damage totaling approximately $2300 were introduced into evidence as R. Exhs. 11 and 12.

[19] Although Moglinicki initially stated that both his telephone and personal contact conversations with Solomon took place on September 25, he recanted later on to say that the conversation with Solomon on Respondent's premises took place after his meeting in Fox's office, discussed infra, which took place on September 30. Fox is counsel for Local 202 and his letter of September 30 to the New York State Board of Mediation requesting arbitration of Sanchez' *indefinite suspension* points out the misunderstanding that existed between Solomon and Mogilnicki. See G.C. Exh. 18.

[20] Solomon stated that he weighed discharging Sanchez but, on advice of counsel, opted for suspension.

[21] Mogilnicki admits that he was present at this meeting in Fox's office.

charge.[22] And, on Monday, October 5, a picket line was set up by Sanchez with the aid of about 10 members of the TDU. It was joined by about 35–40 employees of Respondent. Some of the picket signs said: "We demand our shop steward back to work"; "Give Daddy his job back"; We're here in support of Roberto Sanchez, TDU Member"; "Injury to one, injury to all." Abe Solomon testified and Sanchez confirmed the fact that both Bagley and Mogilnicki were present at the picket line on October 5 and were attempting to get the employees back to work. On October 6, Respondent sent the following letter (R. Exh. 7) to all its employees with the exception of Sanchez:

> Please be advised that your are engaged in an unlawful work stoppage—A WILDCAT STRIKE—which is a ground for DISCHARGE.
>
> Unless you terminate you strike and return to work at 8 AM on Friday, October 9, 1981, you may consider yourself discharged at 8:01 AM on Friday, October 9, 1981.[23]

Sanchez credibly testified that he was shown the letter by employees either on October 8, or before 8 a.m. on October 9, and that he advised the employees to go back to work. When he was asked on cross-examination whether he attempted to go back in, he readily admitted that he had not because he did not receive the letter. While several employees returned to work on October 9, many did not, and from that point on, Respondent only permitted those employees to return to work whom it selected and not all who wished to return.[24]

Analysis and Conclusions

From the uncontroverted background record established by the General Counsel, it is quite evident to me that Local 202 was lax in properly representing Respondent's employees. Such laxity afforded Respondent great latitude in the operation of its business, to say nothing of the monetary gain it derived therefrom. And, it was against this background that Sanchez was chosen to be shop steward. Immediately on taking office, Sanchez embarked on a campaign to attempt to properly enforce the collective-bargaining agreements and to correct the alleged inequities foisted on the employees by Respondent in the absence of proper representation by Local 202. However, the evidence is clear that Respondent sought to thwart his efforts from the start. On the very day that Sanchez was chosen shop steward of both units, July 1, Respondent refused to recognize him as steward of the floorworkers, claiming that, as a driver, he was on the road a substantial portion of the working day and therefore could not properly represent the floorworkers. The fact that the two units of employees were always represented by one shop steward throughout Respondent's collective-bargaining history, and that no shop steward has replaced Sanchez, belies the Respondent's argument. As the Board stated in *Bates Bros,* 135 NLRB 1295, 1297 (1962):

> It is well established that, in the absence of special circumstances, an employer does not have a right of choice either affirmative or negative as to who is to represent employees for any of the purposes of collective bargaining.

And, since this case shows no "special circumstances" within the meaning of Board law, such action by Respondent indicates a desire by it to frustrate the statutory provision which prohibits an employer from choosing or interfering with the employees' choice of representative.

On the very next day, Respondent resorted to acts of interrogation and threats regarding union activities which manifested themselves in conversations between Sanchez and Abe Solomon. In each instance, I credit Sanchez who appeared to testify in a straightforward and logical manner. Solomon, on the other hand, was evasive in his responses. And as the days and weeks passed through the rest of July, and into August and September, and Sanchez was actively engaged in filing many grievances, Respondent resorted to other methods of intimidation. This took the form of refusing to advance toll money to Sanchez as had been Respondent's prior policy, of warning him about talking to employees about union activities, and, by sending letters to Local 202 complaining about Sanchez' work performance.

The ultimate act of retribution, prior to September 25, was the placing of Sanchez on the night shift and requiring that he work Sunday also. Respondent contends that Sanchez had a poor performance record and had to be shifted on several occasions during his employment; that placing him on the night shift gave Respondent an opportunity to observe his work; and that Respondent needed a man of Sanchez' intelligence to do that job. As stated above at footnote 13, I find insufficient evidence to sustain Respondent's contention as to Sanchez' work performance, and while I agree with Respondent that it wished to keep him under observation, I find that it was not to see that he performs his work properly, but to scrutinize his union activities and that, because of the latter, Sanchez was subjected to more onerous tasks in violation of the Act.

All of this culminated in the September 25 event. From the uncontroverted evidence presented, I conclude that the indefinite suspension meted out to Sanchez on September 25 was tantamount to discharge and that, although Respondent on October 2 changed the indefinite suspension into a 2-week suspension, that was never communicated to Sanchez or to any employee by either Respondent or Local 202. Therefore, when the employees met on October 3, it was their belief that Sanchez

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[22] Several employees, including Elva and Santia Rodriguez, testified that they walked out on October 5 to protest Respondent's treatment of Sanchez.

[23] The parties stipulated that Respondent mailed the letter to about 50 employees.

[24] According to par. 17 of the consolidated complaint in Cases 2-CA-18361 and 2-CA-18370, of the 23 employees discharged as of October 9, 8 employees were reinstated sometime between October 13 and 19. At the hearing on March 2, 1982, Respondent stated that it was offering unconditional reinstatement to 13 of the remaining 15 employees as of March 15, 1982, excluding only Santia Rodriguez and Elva Rodriguez. Sanchez was never offered reinstatement and, according to Abe Solomon's testimony, there has been no shop steward for either unit since Sanchez was terminated.

had been discharged, and the resulting action engaged in by the employees on October 5 and thereafter was in protest of the discharge. I do not accept Respondent's contention that the October strike was called primarily to embarrass Local 202 and to strengthen TDU, and that the reinstatement of Sanchez was merely a secondary motive. While it may be true that TDU had its own ax to grind, the evidence does not sustain the contention. Rather, the testimony of several employees explicitly stated that it was the reinstatement of Sanchez that was desired. Never before did the employees have such a stalwart cohort to rally around in their demands of management and they were not about to lose him. This itself brings me to the conclusion that Respondent's precipitous action of discharging Sanchez on September 25, albeit later softened to a 2-week suspension, was the direct result of Sanchez' union activities and therefore constituted an unfair labor practice in violation of Section 8(a)(3) of the Act.

The next issue to be dealt with is whether the no-strike clause contained in both collective-bargaining agreements precluded the employees herein from protesting Respondent's discharge of Sanchez by striking on October 5.

In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), the Supreme Court refused to imply a waiver of the right to strike against the unfair labor practices there involved from a no-strike clause contained in a collective-bargaining agreement. In *Arlan's Department Store*, 133 NLRB 802 (1961), the Board rejected a broad reading of the Court's decision which would have excluded all unfair labor practice strikes from the operation of no-strike clauses and concluded that "only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses." The test to be applied in determining seriousness was experience, good sense, and good judgment.

Viewing the facts in the instant case, I conclude that Respondent engaged in a serious unfair labor practice when it discharged Sanchez on September 25. As stated above, Local 202 exhibited hardly any interest in the welfare of Respondent's employees and, with Sanchez removed, the employees were left with virtually no representation. Inasmuch as I have previously stated that Respondent's discharge of Sanchez constituted a violation of the Act, I conclude that its attempt to deprive its employees of proper representation constituted a serious unfair labor practice within the meaning of that term as used in *Arlan's*, supra. Accordingly, I find the no-strike clause in the collective-bargaining agreements not applicable in the instant case, that the strike was caused by Respondent's unlawful action in discharging Sanchez, and I also find that the employees engaged in the strike were engaged in a protected concerted activity. Therefore, the discharges meted out pursuant to Respondent's letter of October 6 were all in violation of Section 8(a)(1) and (3) of the Act.[25]

Having found that Respondent had unlawfully discharged certain employees who were engaged in a lawful strike, I shall order Respondent to reinstate the employees despite the fact that the employees may not have requested reinstatement.[26]

Although I have found Respondent in violation of Section 8(a)(1) and (3) of the Act, I do not find an 8(a)(4) violation as alleged. No evidence was presented by the General Counsel to sustain the 8(a)(4) allegation, except perhaps the inference to be drawn from the proximity of the events. However, it is my conclusion that Respondent's discriminatory conduct toward Sanchez began on July 1 and was a continuing process until his discharge on September 25. All that transpired in between was not the result of the filing of the second, third, or fourth charges, but was an ongoing effort by Respondent to subdue Sanchez. Inasmuch as the General Counsel has failed to link specifically the actions of Respondent to the filing of charges by Sanchez, I shall dismiss those allegations relating to an 8(a)(4) violation.

CONCLUSIONS OF LAW

1. Goodie Brand Packing Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 202, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Roberto Sanchez on September 25, 1981, because as shop steward he engaged in protected concerted activities for the purpose of collective bargaining, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

4. The strike which began on October 5, 1981, was a protected unfair labor practice strike that had been caused by Respondent's above-described unlawful conduct.

5. By discharging and refusing to reinstate the following employees who were engaged in the strike:

Jose Rodriquez	Mariliez Torrez
Ana La Roche	Rafael Larracuente
Santia Rodriguez	Jose Suarez
Elva Rodriguez	Andres Tejada
Maria Luisa Rentas	Juanita Sedano
Isabel Bank	Natalio Santiago
Nancy Santana	Victor Negron
	Raul Robles

Respondent violated Section 8(a)(3) and (1) of the Act.[27]

6. By threatening, warning, and interrogating Sanchez, and by assigning him more onerous working conditions, all because of his protected concerted activities, Respondent thereby restrained and coerced employees in the exercise of their Section 7 rights and violated Section 8(a)(1) of the Act.

[25] Respondent contends in the brief that its letter of October 6 was a letter of reinstatement. I reject that contention; rather, it had the effect of discharging the strikers. *NLRB v. International Van Lines*, 409 U.S. 48 (1972).

[26] *Abilities & Goodwill*, 241 NLRB 27 (1979).

[27] See fn. 24, supra.

7. Respondent did not engage in any other unfair labor practices as alleged.

REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discharged Roberto Sanchez in violation of his Section 7 rights, I find it necessary to order Respondnt to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, with backpay computed as prescribed *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

As the strike herein has been found to be an unfair labor practice strike and, as Respondent, on October 9, 1981, discriminatorily terminated the employees named above in paragraph 5 of the section entitled "Conclusions of Law" who engaged in the strike, I shall order Respondent to offer the employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, and make each of them whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful discrimination against him or her on the same basis as stated in the previous paragraph.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Goodie Brand Packing Corp., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees because of their status as officials of Local 202, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) Discharging or otherwise discriminating against any of its employees because of their participation in protected strike activities.

(c) Warning and threatening employees with discharge for engaging in protected concerted activities.

(d) Coercively interrogating employees concerning their union sentiments and activities.

(e) Assigning more onerous working conditions to employees because they engaged in protected concerted activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Roberto Sanchez, Jose Rodriguez, Ana La Roche, Santia Rodriguez, Elva Rodriguez, Maria Luisa Rentas, Isabel Bank, Nancy Santana, Mariliez Torrez, Rafael Larracuente, Jose Suarez, Andres Tejada, Juanita Sedano, Natalio Santiago, Victor Negron, and Raul Robles immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, and make them whole for their lost earnings in the manner set forth above in the section entitled "Remedy."

(b) Expunge from its files any reference to the discharges of the employees named above in (a), and notify each of the discriminatees in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its New York, New York place of business copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2 within 20 days from the date of this Order what steps have been taken to comply.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[29] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."